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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1689

H. R. MORGAN, INC., and UNITED STATES FIDELITY AND GUARANTY CO., *Petitioners*

v.

UNITED STATES OF AMERICA, for and on behalf of MISSISSIPPI ROAD SUPPLY CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners H. R. Morgan, Inc., and United States Fidelity and Guaranty Co., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on November 12, 1976.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 542 F. 2d 262 (App. 1a) The denial of rehearing is not reported. (App. 1a) The *per curiam* opinion of the Court of Appeals, rendered March 5, 1976, re-

manding this case with directions is reported at 528 F. 2d 986 (App. 15a) The opinion of the United States District Court for the Southern District of Mississippi, rendered August 5, 1976, is not reported. (App. 17a)

II.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 12, 1976. A timely petition for rehearing was denied on December 29, 1976. Upon application of counsel for petitioners, an Order was rendered by the Honorable Lewis F. Powell, Associate Justice of the Supreme Court of the United States, on March 3, 1977, whereby the time for filing a Petition for Writ of Certiorari in this Cause was extended to and including May 28, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

III.

QUESTIONS PRESENTED

Whether provisions in a federally approved lease, to which the United States is not a party, possess the force of law.

Whether, consistent with the Fifth Amendment, a Contractor and its Surety can be bound by provisions, arguably required by a regulation of a federal agency, in an unrecorded lease to which the contractor is not a party.

Where neither 28 U.S.C. § 1352, which provides the jurisdictional basis for an action brought on a Federal Bond, nor the Federal Statute or regulation requiring

such Bond undertakes to fix the respective rights of parties against the Bond, may a Federal Court formulate federal common law to grant a right of action against the Bond where the law of the State where the Bond is made specifically denies a right of action.

IV.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

United States Constitution—Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

28 U.S.C. § 1352 (1948) Bonds Executed Under Federal Law

> The district courts shall have original jurisdiction, concurrent with State courts of any action on a bond executed under any law of the United States.

Code of Federal Regulations, Title 25, Indians, Part 131, § 131.5 (a), (c), (g), (App. 21a)

§85-7-185 Miss. Code Ann. (1972) Bond-Provisions-Right to Intervene in Action on Bond. (App. 22a)

V.

STATEMENT OF THE CASE

On May 9, 1972, H. R. Morgan, Inc., (Morgan) a Mississippi Corporation, contracted with Chata Development Corporation, a private, non-profit, Missis-

sippi Corporation,[1] (Chata) for construction on an industrial development under an Economic Development Administration funded project.[2] Morgan and its

[1] Throughout the entire proceedings, it was never seriously contended that Chata Development Corporation was anything but a private, non-profit, Mississippi corporation, and the Fifth Circuit Court of Appeals took cognizance of this fact in its opinion. (App. 2a)

[2] The Contract provided as follows:

THIS AGREEMENT, made ..... by and between CHATA DEVELOPMENT COMPANY, acting herein through its Chairman hereafter called OWNER, and H. R. MORGAN, INC., doing business as a corporation located in the City of PETAL, County of FORREST and State of MISSISSIPPI, hereinafter called CONTRACTOR.

WITNESSETH: That for and in consideration of the payments and agreement hereinafter mentioned, to be made and performed by the OWNER, the CONTRACTOR hereby agrees with the OWNER to commence and complete the construction described as follows:

CONTRACT C—WATER, SEWER AND SITE IMPROVEMENT
ECONOMIC DEVELOPMENT ADMINISTRATION PROJECT
No. 04-1-00836

hereinafter called the PROJECT, for the sum of THREE HUNDRED TWENTY THREE THOUSAND THREE HUNDRED TWELVE AND 53/100 DOLLARS ($323,312.53) and all extra work in connection therewith, under the terms as stated in the General Conditions of the CONTRACT and at his (its or their) own proper cost and expense to furnish all the materials, supplies, machinery, equipment, tools, superintendence, labor, insurance, and other accessories and services necessary to complete the said PROJECT in accordance with the conditions and prices stated in the Proposal, the General Conditions and Special Conditions of the CONTRACT, the PLANS, which include all maps, blue prints, plats, and other drawings and printed or written explanatory matter thereof, the SPECIFICATIONS and CONTRACT DOCUMENTS therefor prepared by ENGINEERING ASSOCIATES, INC., herein entitled the ENGINEER, and as enumerated in Paragraph 1 of the Supplemental General Conditions, all of which are made a part hereof and collectively evidence and constitute the CONTRACT. The CONTRACTOR hereby agrees to commence work under this contract on or before a date to be specified in written NOTICE TO PROCEED of the OWNER and to fully complete the project

Surety, United States Fidelity & Guaranty Co. (U.S. F.&G.), executed a payment bond to Chata as the sole obligee, securing payment by Morgan of persons and corporations furnishing materials or performing labor under the contract.[3] At the time of the making of the bond and contract, there existed no Economic

within 180 consecutive calendar days thereafter. The CONTRACTOR further agrees to pay, as liquidated damages, the sum of $25.00 for each consecutive calendar day thereafter as hereinafter provided in Paragraph 19 of the General Conditions.

The OWNER agrees to pay the CONTRACTOR in current funds for the performance of the CONTRACT, subject to additions and deductions, as provided in the General Conditions of the CONTRACT, and to make payments on account thereof as provided in Paragraph 25, PAYMENTS TO CONTRACTOR of the General Conditions . . .
Signatures omitted.

[3] The bond was entitled PAYMENT BOND. It provided that petitioners were bound unto Chata Development Corp.

". . . for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally firmly by these presents."

. . . . .

"THE CONDITION OF THIS OBLIGATION is such that Whereas, the Principal entered into a certain contract with the Owner, dated the 9th day of May, 1972, a copy of which is hereto attached and made a part hereof for the construction of: Contract C Water, Sewer, and Site Development Administration, Project No. 04-1-00836, Chata Industrial Park, Pearl River Indian Reservation, Neshoba County, Mississippi.

Now, THEREFORE, if the Principal shall promptly make payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of the work provided for in such contract, and any authorized extension for modification thereof, including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment and tools, consumed or used in connection with the construction of such work whether by subcontractor or otherwise, then this obligation shall be void; otherwise to remain in full force and effect."

Development Administration regulation requiring this bond.[4]

The Industrial Development was situated on Indian Lands of the Mississippi Band of Choctaw Indians, who had leased the land to Chata. The execution of the Business Lease Agreement between Chata and the Mississippi Band of Choctaw Indians was approved by a representative of the Secretary of the Interior, as provided by 25 C.F.R. Part 131, *et seq.* The lease contract was not recorded.[5] The lease contract required that *Chata, as Lessee,* provide security which would guarantee completion of the improvements, and payment of all claims of all persons for work performed on or material furnished for that construction.[6]

Subsequently, Morgan subcontracted with Bobby Gray Young, dba Young Construction Company (Young) to do certain earth work on the Industrial Development site. The litigation arose following the failure of Young to pay Mississippi Road Supply Co., his equipment supplier, for certain equipment he leased and repair parts he had purchased in order to maintain the heavy equipment leased from Mississippi Road Supply Co. The suit was originally brought by Mississippi Road Supply Co., alleging that the United

[4] Code of Federal Regulations, Title 13, Part 305, § 305.94, which requires a payment bond on E.D.A. funded projects, was effective *only from January 23, 1977,* approximately seven months after the contractual rights of the parties to this litigation vested.

[5] The Business Lease Agreement was never recorded in the land records of Neshoba County, Mississippi, where the demised premises were located. This fact was introduced by Stipulation into the record in the proceedings in the District Court following the remand with directions by the Fifth Circiut.

[6] App. 3a, note 2.

States District Court had jurisdiction by virtue of the Miller Act, 40 U.S.C. § 270a & 270b, and naming as Defendants: Morgan, Prime Contractor; U.S.F.&G., Surety; Young, Subcontractor.

On March 14, 1974, a default judgment was entered against the Defendant, Young. Subsequently, on June 3, 1974, the Lower Court overruled these petitioner's Motion to Dismiss for Lack of Jurisdiction and found that the Court had jurisdiction pursuant to *40 U.S.C. § 270a & 270b.* The litigation proceeded to trial, the jury was instructed in accordance with the substantive provisions of the Miller Act, and a judgment was rendered against these Defendants, which was appealed to the Circuit Court of Appeals for the Fifth Circuit.

The Fifth Circuit remanded the case with directions to the Lower Court for appropriate factual development and determination, and a reconsideration of the jurisdictional issue in light of that determination.[7] On remand, the Lower Court again determined that Miller Act jurisdiction vested and further *found for the first time* that it had alternative jurisdiction under *28 U.S.C. § 1352, Bonds executed under Federal Law.*[8]

Subsequently, the Fifth Circuit declined to resolve the issue of whether Miller Act jurisdiction existed, finding that the bond, executed by petitioners in favor of Chata, was a bond executed under a law of the United States, thereby conferring jurisdiction upon the District Court by virtue of *28 U.S.C. § 1352.* In its opinion, the Fifth Circuit determined that since *28 U.S.C. § 1352* furnished no federal legislative standard

[7] App. 15a.

[8] Opinion of the United States District Court for the Southern District of Mississippi, dated August 5, 1976. (App. 17a)

and the federal law under which the bond was required supplied no criteria for coverage, the Court was not bound by State law, but was free to interpret Morgan's bond according to federal common law principles.[9]

VI.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DECIDES A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. Why this Case should be Heard.

28 U.S.C. § 1352 presents a federal question that has never been before this Court. In its twenty-nine years of existence, it has been construed twenty to thirty times in reported decisions, but no Writ of Certiorari has ever been sustained to allow this Court to address the Statute.

The opinion of the Fifth Circuit Court of Appeals will no doubt be a landmark decision in the history of this Federal Statute. With the advent of revenue sharing and increased federal involvement in both state and local transactions, more federal regulations requiring surety bonds have been promulgated than at any time in United States history. The ambit of *§ 1352* needs definition; the parameters of its application need elucidation by this Court.

In the Lower Court, Morgan contended that the bond it executed, was not a bond required by the Miller Act nor *§ 1352*, and therefore, the District Court lacked jurisdiction. Morgan's contention as to the inapplicability of the Miller Act was in effect sustained

[9] 542 F. 2d at 267 (App. 9a)

by the Fifth Circuit when that Court twice failed to find Miller Act jurisdiction. Morgan's argument as to the inapplicability of *§ 1352* was based on the fact that: (1) Neither *25 U.S.C. 415*, nor the regulations promulgated thereunder, *25 C.F.R. 131* required a Payment Bond; and (2) if a bond was required by the regulations, it was *Chata's* Bond, not Morgan's Bond that was required.

The Fifth Circuit's conclusion that, under the circumstances in this case, *§ 1352* jurisdiction obtained, raises for the first time serious Constitutional questions. In determining the applicability of *§ 1352*, the Fifth Circuit found that *25 C.F.R. 131.5 (c)* required the Lessee, Chata, to post a Payment Bond,[10] and in order ". . . [t]o meet its lease obligation, Chata required the prime contractor, Morgan, to post the above-described bond". (App. 2a) This construction of *§ 1352* by the Fifth Circuit, in labeling Morgan's bond "a bond required by a law of the United States", when Morgan's bond is not the bond required by the regulation, denies Morgan and its Surety the due process guaranteed by the Fifth Amendment.

Further, in interpreting the coverage of Morgan's Bond under *§ 1352*, the Fifth Circuit formulated federal common law and interpreted Morgan's bond according to the standards of a judicially created Miller Act, thereby according Mississippi Road Supply Co., a right of action against the bond, State Law to the

[10] A cursory examination of 25 C.F.R. 131.5 (c) (App. 21a) reveals that only a Performance Bond was required to be executed by the Lessee, Chata, for the benefit of the United States as well as the owner of the land, the Mississippi Band of Choctaw Indians. No requirement of a Payment Bond is provided for in the regulations.

contrary notwithstanding. This extremely liberal construction of § *1352* as setting the *jurisdiction, right,* and *remedy* commits substantive federal question error.

B. Due Process

The bond in issue was executed pursuant to a private contract between private parties.[11] Under the Fifth Circuit's rationale, Morgan and its Surety have in effect been bootstraped into Federal Court under § *1352* by virtue of a federal statute and its implementing regulation, neither of which provides for a Payment Bond, nor provides for any bond to be supplied by anyone other than the Lessee, *Chata,* and by virtue of an unrecorded business lease contract between Chata and the Mississippi Band of Choctaw Indians.[12]

Notice of the obligations to which parties bind themselves is an essential element of a valid contract.[13] The application of § *1352* in this case, where there is an absence of Congressional enactment or agency regu-

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[11] In its opinion, the Fifth Circuit took judicial cognizance of the fact that "Morgan's contract [was with] . . . Chata, a private non-profit corporation . . .", and that the State Law, if controlling, would be ". . . Mississippi's private bond law" (App. 2a, 9a)

[12] 25 U.S.C. § 415 and its implementing regulation, 25 C.F.R. § 131.5 (App. 21a) *specifically require a performance bond from Chata.* The business lease agreement, (App. 3a, note 2) does provide for a Payment Bond to be posted by the *Lessee, Chata;* neither the statute, regulation, or business lease contract require a performance or payment bond from Morgan. The lease was unrecorded. See note 5 *supra.*

[13] Though not dealing directly with the issue of Fifth Amendment due process, this Court considered the unconscionability of binding a contracting party to obligations not bargained for in United States v. Yazell, 382 U.S. 341, 346.

lation or even any stipulation in the negotiated contract between Morgan and Chata or any warning to Morgan that its bond, executed pursuant to its contract with *Chata,* would be interpreted according to contractual provisions in an unrecorded business lease as a bond ". . . executed pursuant to a law of the United States", flies in the face of Fifth Amendment guarantees.[14]

In *Highland* v. *Russell Car & Snow Plow Co.,* 279 U.S. 253, the Court recognized that ". . . the freedom of people to enter into and carry out contracts in respect to their property and *private affairs* is a matter of great public concern, and that such liberty may not lightly be impaired". 279 U.S. at 261 (*Emphasis Added*). The Fifth Circuit's implementation under § *1352* of a federal common law and the abandonment of State law, which limits the obligation of payment under Morgan's Bond to materialmen in privity with Morgan, in conjunction with the fact that Morgan en-

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[14] The Fifth Circuit's approach seemingly contradicts its decision in United Bonding Insurance Company v. Alexander, 413 F. 2d 1025 (5th Cir. 1969) wherein it held that the Issuer of Fidelity Bonds, securing the U. S. Post Office from losses caused by the failure of postal employees to faithfully perform their duties, could not bring a § 1352 action against postal employees for claims filed by the Post Office against the Bonds, stating . . . "[s]ection 1352 is applicable only to a suit *on a bond,* which means a suit against one bound by its terms for breach of duty arising under it. The two-party agreement between the Post Office Department and United Bonding cannot be *stretched* to permit suit against the postal employees, *who are not parties to it". Id.* at 1026 (emphasis added).

In the instant suit, the Court has allowed the two-party agreement between the Mississippi Band of Choctaw Indians and Chata, which required a Bond from Chata, to be stretched to permit suit against Morgan, who was not a party to the agreement requiring the bond.

tered into the contract with Chata and executed its bond without any thought that the defense of Privity, with respect to rights of action against said bond, would be unavailable to Morgan and its Surety, vitiates Morgan's Fifth Amendment due process rights.

C. The Determination By the Fifth Circuit of the Applicable Law in this case raises an important issue of Federal–State relations.

Having determined that the Morgan Bond was ". . . executed under a law of the United States", the Circuit Court looked to § *1352* in order to construe the coverage of the bond. Finding that § *1352* provided no federal legislative standard, the Court concluded that it could look to both the Miller Act and Mississippi's private bond law[15] in formulating a common law to interpret coverage[16] of Morgan's Bond. (App. 9a) The Fifth Circuit then looked to the ". . . federal law under which the bond was required . . .", (App. 9a)[17] which the Court determined ". . . suggests no purpose other than the normal good business practice of assuring project completion, free of liens for unpaid labor and materials" (App. 9a). Specifically finding that the underlying statute furnished no unique standard for coverage, the Court reviewed the language of

[15] Miss. Code Ann. 85-7-185 (1972) (App. 22a) provides for a bond obligating the person making a private contract to faithfully perform it for the benefit of the owner (Chata) and also to assure payment ". . . *to all persons* furnishing labor or material under said contract . . .". The Supreme Court of Mississippi in Alabama Marble Co. v. United States Fidelity & Guaranty Co., 146 Miss. 414, 111 So. 573 (1927) *expressly* construed the statutory scope of such a bond as *not extending* to labor and materials *furnished to subcontractors.*

[16] The Court chose to apply Miller Act coverage. (App. 9a)

[17] See note 12, *supra.*

the lease contract and determined that it provided for a bond to insure payment of *all* persons, regardless of privity with the contractor, for work performed in or materials furnished for construction. (App. 9a)[18] The Court then reviewed the language of the bond instrument executed by Morgan[19] and found that it specifically guaranteed payment to Mississippi Road Supply Company.

The Fifth Circuit's approach to § *1352* avoids the most critical facet of the case: whether federal interests exist under these circumstances, the implementation of which require overriding the Mississippi State rule involved here. In *United States* v. *Yazell*, 382 U.S. 341, the Court dealt with the issue of whether the Federal Government, in a suit on the balance due on a Small Business Administration loan, could obtain

[18] An examination of the lease provisions reveals that the bond, required by the lease, ". . . shall be conditioned upon the faithful performance of Lessee and give all claimants a *right of action to recover* upon said bond in any suit brought to foreclose mechanic's or materialmen's liens against the property" (App. 3a, note 2) (*emphasis added*). The Fifth Circuit specifically found that lien remedies were available against the leasehold interest of Chata. (App. 6a) However, Miss. Code Ann. § 85-7-181 (1972) specifically provides that the right to acquire a lien is *limited* to persons engaged by the original contractor and does not extend to others who supply materials or labor at the request of the subcontractor. A *remote materialman,* in this instance, Mississippi Road Supply Co., *is not* so *protected.* Miss. Code Ann. § 85-7-185 provides that Morgan's Bond could be given to take the place of the mechanic's lien or materialmen's lien provided in 85-7-181. Monroe Banking and Trust Company v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968); *accord* Alabama Marble Company v. United States Fidelity & Guaranty, *supra.*

[19] The language in Morgan's Bond was patterned almost verbatim after the language in Miss. Code Ann. 85-7-185. *See* App. 22a and note 3, *supra.*

judgment against a married woman who co-signed on the Note but who, under the Texas law of coverture could not bind her separate property unless she had first obtained a Court decree removing her disability to contract. The case presented a clear conflict between: (1) the *federal interest* in collecting the deficiency from the married woman's separate property and, (2) state law dealing with an intensely local interest. 382 U.S. at 343, 349.

While noting that there is always a federal interest to collect money which the Government lends, the Court determined that in the absence of *specific Congressional action,* it should not decree that implementation of federal interest required overriding the particular state law. 382 U.S. at 352. Though expressing a personal distaste for coverture provisions, the Court concluded:

> . . . [t]he precedents of this Court teach us solicitude for state interests . . . They should be overridden by the federal courts only where *clear and substantial interests* of the *National Government,* which cannot be served consistently with respect for such state interests, will suffer *major damage* if the state law is applied. [382 U.S. at 352. (*Emphasis Added*)] . . . None of the cases in which this Court has devised and applied a federal principle of law superceding state law involved an issue *arising from an individually negotiated contract.* None of these cases permitted federal imposition and enforcement of liability on a person who, according to state law, was not competent to contract. [382 U.S. at 353, (*Emphasis Added*)]

In the instant case, the federal interest, if any, was to insure that Chata lived up to its obligations under the lease contract with the Mississippi Band of Choc-

taw Indians, and the Secretary of the Interior, pursuant to 25 C.F.R. § 131.5 (c), required a *performance* bond from Chata for that purpose. Virtually no federal interest exists which requires overriding Mississippi's private bond law. The United States is not even a party to this litigation, nor the obligee on Morgan's bond. The rights of both the Mississippi Band of Choctaw Indians and Chata would be unaffected by the application of state law in this case.[20] Balanced against this, is the strong state interest in governing the obligations of persons who make private contracts concerning peculiarly local transactions within the State of Mississippi.

Similarly, in *Bank of America National Trust and Savings Assoc.* v. *Parnell,* 352 U.S. 29, the Court was faced with the issue of whether, in a suit by the owner of government bonds, allegedly stolen, to recover their value from the person who presented the bonds for collection, the presence of a federal interest in government paper required overriding state law regarding the burden of proving notice and lack of good faith on the part of the defendants. The Court (though cognizant that securities issued by the Government generate immediate interest of the Government, *citing Clearfield Trust Company* v. *United States*[21]), never-

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[20] Mississippi Road Supply's position as a materialman of a subcontractor prevents its assertion of any state lien rights against the leasehold interest of Chata. Miss. Code Ann. 85-7-181 (1972).

[21] 318 U.S. 363. In *Clearfield* and its predecessors, the Court's decisions to apply "federal law" to supercede state law typically relates to programs or actions which by their nature required uniformity in character throughout the nation. Ostensibly, the interpretation of private bonds is traditionally a matter of state law; uniformity in their interpretation would be particularly inappro-

theless concluded that the controversy over burden of proof and good faith represented too essentially a *private transaction,* not to be dealt with by the local law of the state where the transaction took place. 352 U.S. at 34.

The decision below ignores the approach adopted in *Yazell* and in *Bank of America National Trust.* As in *Yazell,* in the instant case there exists no substantial federal interest, no need for uniformity, and no problem in complying with state law. There is no defensible reason to override state law in regard to a local transaction as is present in the instant case. This aspect of the case alone justifies the grant of certiorari.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

In the twenty-nine years since *§ 1352* was first enacted, the lower courts have reached widely variant results in the application of the federal statute which, as would be expected after this period of time, produces a clear conflict between circuits and within the circuits themselves. The conflicts have appeared on two fronts: (1) in the interpretation of *§ 1352* as to whether jurisdiction exists (2) in determining whether the action is governed by federal or state law.

In determining that Morgan's bond was a bond "... executed under a law of the United States", the Fifth Circuit's rationale is dramatically inconsistent with the approach utilized by the Second Circuit in

priate.

On the contrary, in De Sylva v. Ballentine, 351 U.S. 570, the Court applied state law to define "children" although the issue arose in connection with the right to renew a copyright—a peculiarly federal area.

Rader v. *Manufacturers Cas. Ins. Co.* 242 F. 2d 419 (2nd Cir. 1957). In *Rader,* the Plaintiffs sought relief in equity and in law against exactions being made against them in demands for payment of moneys forfeited by the defendant surety company on two federal bail bonds. The basis of the demand by the surety company was that the Plaintiffs had signed an indemnity agreement and confession of judgment; when the bail bonds were forfeited, the surety sought indemnification based on these instruments. The Second Circuit specifically found *§ 1352* to be inapplicable. The Court recognized that the bail bonds were *§ 1352* bonds, but reasoned that no law of the United States required the indemnity agreement or confession of judgment in connection with giving a bail bond. Further, the Court determined that the collateral instruments were executed to afford protection to the surety company and did not enure to the benefit of the United States. 242 F. 2d at 427.

The Fifth Circuit's determination that the bond executed pursuant to a private contract between Morgan and Chata was required by regulations governing the contractual provisions in the Lease between the Mississippi Band of Choctaw Indians and Chata, and when the bond did not enure to the benefit of the United States, is also directly in conflict with its prior decision[22] in *United Bonding Insurance Company* v. *Alexanderi* 413 F. 2d 1025 (5th Cir. 1969).

Secondly, even if it is assumed that Morgan's bond was a bond required by a law of the United States,[23]

[22] See note 14, *supra.* ["The two-party agreement between the Post Office Department and United Bonding cannot be *stretched* to permit suit against the postal employees, who are *not parties to it.*" 413 F. 2d at 1026 (*emphasis added*)].

[23] As aforementioned 25 C.F.R. 131.5 (e) (App. 21a) does not

other Circuits have consistently held that the rights and obligations of parties under similar bonds were to be determined by state law. In *Adams* v. *Greeson* 300 F. 2d 555 (10th Cir. 1962) the Court dealt with the issue of whether a livestock company, licensed and bonded under provisions of the *Packers and Stockyards Act*, 7 U.S.C.A. § 181 *et seq.*, and its surety were liable for the cattle it sold for an individual who, when he purchased the cattle from the Plaintiffs, issued a worthless check in payment. The action was brought under § *1352* on the livestock company's bond, which the Court found was specifically required by a law of the United States.[24] The Court reviewed the *Packers and Stockyards Act* and determined that it did not undertake to fix the respective rights of the parties to a transaction of the type in issue, and concluded that the Act did not have the effect of ". . . altering in part or superceding in whole the respective rights of the immediate parties under state law to a transaction of that kind." 300 F. 2d at 557.

Unlike *Adams*, no federal statute or regulation allowed Mississippi Road Supply Co., to maintain an

require a Payment Bond and surely requires no bond from an individual in the position of Morgan. *See* note 12, *supra*. The Fifth Circuit seemingly has interpreted the provisions of the Lease Contract as having the force of law in order to find that a Payment Bond was also required; the lease provisions, however, required that *Chata* post the bond.

[24] The bond was required by 7 U.S.C.A. § 204 and its implementing regulation 9 C.F.R. § 201.29, which required every market agency and dealer to give such bond. By further regulation, the Secretary of Agriculture required that the bond contain a provision ". . . that any person damaged . . ." by failure of the principal to comply with the condition clauses contained in the bond, may maintain suit on the bond . . . ". . . even though such person is not a party named in the bond." (9 C.F.R. § 201.33) 300 F.2d at 557.

action on Morgan's bond. Further, the underlying statute in the decision below, like the *Packers and Stockyards Act*, did not undertake to fix the respective rights of third parties to a bond executed pursuant to a private contract."[25]

Stability in commercial transactions requires that contracting parties be able to adequately predict ramifications of the obligations to which they bind themselves before they contract. With the increased number of federal regulations requiring bonds, businessmen and their sureties deserve more predictable parameters within which each can function. Parties entering a contract must be able to reasonably ascertain the applicable laws, expanding or restricting their respective obligations, prior to binding themselves to those obligations. The existing conflict in and between circuits justifies the grant of certiorari.

[25] Although not dealing with § 1352, in Maternally Yours v. Your Maternity Shop, 234 F. 2d 538 (2nd Cir. 1956), the Court, in determining whether a claim of unfair competition was governed by federal or state law, concluded ". . . it is the *source of the rights sued upon* and not the ground upon which the federal jurisdiction over the case is founded which determines the governing law . . . Thus, the *Erie Doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.*" 234 F. 2d at 541, note 1 (*Emphasis Added*).

The Eighth Circuit, apparently adopted the rationale in *Maternally Yours* in Luick v. Graybar Electric Co., Inc., 473 F. 2d 1360 (8th Cir. 1973), holding that, in an action brought under § 1352, the law of the state, where the contract was to be performed, was controlling in determining whether the claimed damages for loss profits, loss rental value for idle equipment, etc., were direct or special damages, *citing Erie* v. *Tompkins*. *Id.* at 1363.

VII.

CONCLUSION

The decision below will no doubt be a landmark decision of *§ 1352*. The application of *§ 1352*, in the Fifth Circuit's decision, sets the stage for extremely liberal construction of the Statute to bring bonds tenuously related to federal statutes and regulations within the ambit of Federal Court jurisdiction and to allow the Federal Court taking jurisdiction over the bond action to interpret the conditions therein according to federal common law standards, contrary state law provisions notwithstanding. Under the direction taken in the decision in this case, a bond, given by a subcontractor to his principal contractor and passed along by the contractor to the *Owner* of the property, without notice to the subcontractor, and the same bond then passed by the *Owner* to the Federal Government in order to satisfy a federal regulation requiring the *Owner* to post a bond for the benefit of the Government, will be construed as a "federal bond". In its best light, the decision of the Court of Appeals sows the seeds of destruction of the due process guaranteed by the Fifth Amendment. It conveys the message to contracting parties, that the label "bond executed under a law of the United States", like a magic talisman, may be utilized to bring *§ 1352* actions on bonds, whenever one of the plethora of existing federal regulations is tenuously related thereto, in order to have the obligations of the bond construed according to federally formulated common law standards (coverage of Morgan's bond was interpreted according to the Miller Act) and avoid implementation of undesirable state laws. No matter how viewed, the decision below has imposed obligations upon the Petitioners which were

not bargained for in their contract with Chata. The stamp of judicial approval: a decision in conflict with precedent of this Court and with decisions of other Courts of Appeal. The writ must issue.

Respectfully submitted,

FRANCIS T. ZACHARY
P. O. Box 24
Hattiesburg, Mississippi
Attorney for Petitioners

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 74-3761

UNITED STATES OF AMERICA for and on behalf of
MISSISSIPPI ROAD SUPPLY CO., *Plaintiff-Appellee,*

versus

H. R. MORGAN, INC., U.S. FIDELITY AND
GUARANTY CO., ET AL., *Defendants-Appellants,*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI —

On Petition for Rehearing

(December 29, 1976)

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of H. R. Morgan, Inc., and U.S. Fidelity and Guaranty Co. in the above entitled and numbered cause be and the same is hereby denied.

• • • • • • • • • •

APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 74-3761

UNITED STATES of America for and on Behalf of MISSISSIPPI ROAD SUPPLY CO., *Plaintiff-Appellee,*

v.

H. R. MORGAN, INC. and U.S. Fidelity and Guaranty Co., et al., *Defendants-Appellants.*

Nov. 12, 1976

• • • • • • • • • •

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

CLARK, Circuit Judge:

This use action was brought by Mississippi Road Supply Company (Mississippi Road Supply) against Bobby Gray Young d/b/a Young Construction Company (Young), H. R. Morgan, Inc. (Morgan), and United States Fidelity and Guaranty Company (USF&G). Mississippi Road Supply seeks to recover equipment rental and repair expenses on construction machinery rented to Young and alleged to have been used by him on a construction project as a subcontractor, together with attorneys' fees. Morgan, the prime contractor, furnished the project owner, Chata Development Corporation (Chata), a general contractor's payment and performance bond on which USF&G was surety. Morgan's contract with Chata was to build an industrial development park on land which Chata, a private, nonprofit corporation, held by virtue of a 25-year lease with an option to extend the lease for an additional 25-year term.

JURISDICTION

Title to this land is held by the United States. The lessor in the contract on which Chata depends was the "Mississippi Band of Choctaw Indians," and the execution of the lease was approved by a representative of the Secretary of the Interior as provided by 25 C.F.R., Part 131, *et seq.*[1] Section 131.5(c) of these regulations provides:

> Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:
>
> (1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.
>
> (2) The estimated construction cost of any improvement to be placed on the land by the lessee.
>
> (3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

In compliance with this regulation, the approved lease contract required that Chata, as lessee, provide security which would guarantee completion of the improvements contemplated by the lease and payment in full of all claims of all persons for work performed on or materials furnished in that construction. The pertinent portions of the lease are set out in the margin.[2] To meet its lease obligation, Chata

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[1] We note, but do not base our decision here in any part on, *United States* v. *State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974), *petition for rehearing denied*, 535 F.2d 300 [1976], in which we held the "Mississippi Band of Choctaw Indians" was not an Indian tribe and its members were citizens of the State of Mississippi.

[2] The lease document was entitled:

UNITED STATES

required the prime contractor, Morgan, to post the above-described bond.

Mississippi Road Supply rented various machines to Young which it claimed Young used as Morgan's subcontractor for working on the industrial part covered by the lease contract discussed above. Jurisdiction for the action to recover for this indebtedness from both the prime con-

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DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MISSISSIPPI BAND OF CHOCTAW INDIANS
PHILADELPHIA, MISSISSIPPI

BUSINESS LEASE CONTRACT

It stated in preface that it was made under and in accordance with the provisions of "existing law and the regulations prescribed by the Secretary of the Interior in the Code of Federal Regulations, Title 25, Indians, Part 131, and any amendments thereto relative to leases on restricted Indian lands which by reference are made a part hereof."

Pargaraph 12(e) provided:

> Before commencement of construction of each improvement on the leased premises, Lessee agrees to provide security which will guarantee completion of the improvement, and payment in full of claims of all persons for work performed in or materials furnished for construction. Lessee may provide said security by posting a corporate surety bond in an amount equal to the cost of improvment, said bond to be deposited with the Secretary and to remain in effect until the improvement is satisfactorily completed. Said bond shall be conditioned upon the faithful performance of Lessee, and give all claimants the right of action to recover upon said bond in any suit brought to foreclose mechanic's or materialmen's liens against the property. Upon approval of this lease by the Secretary, the Lessee agrees to post a corporate surety bond in a penal sum of not less than one year's minimum rent.

In Paragraph 19 the lessee contracted and agreed that all bills for labor and materials incurred in the construction or maintenance would be promptly paid as the same became due and payable and that no mechanics', laborers', or materialmen's liens would be permitted to accrue.

tractor and the surety was initially asserted on the basis of the Miller Act, 40 U.S.C. §§ 270a and 270b. The trial below was conducted on this jurisdictional premise, and all jury instructions were drawn from Miller Act law. However, for reasons later apparent, we pretermit deciding whether jurisdiction exists under the Miller Act.

This, of course, is not a garden variety Miller Act case in which the United States both owns the land and contracts for its improvement. *See, e.g., United States ex rel. Jinks Lumber Co.* v. *Federal Insurance Co.*, 452 F.2d 485 (5th Cir. 1971); *United States ex rel. Friedrich Refrigerators, Inc.* v. *Forrester*, 441 F.2d 779 (5th Cir. 1971); *United States ex rel. T/N Plumbing and Heating Co.* v. *Fryd Construction Corp.*, 423 F.2d 980 (5th Cir. 1970). Rather, it is contended to be a case governed by the Miller Act because of the extent of involvement of the United States.

One major purpose of the Miller Act is to protect subcontractors and materialmen working on federal projects since normal state lien rights are not available. *United States Fidelity & Guaranty Co.* v. *United States*, 475 F.2d 1377 (Ct.Cl.1973) (en banc). It is axiomatic that state law liens may not be asserted against federally owned lands or buildings. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 67 S.Ct. 1599, 91 L.Ed. 2022 (1947). In addition, Miller Act bonds are provided in order to protect the United States from suits rested upon its equitable duty to ensure that subcontractors and suppliers of materials receive payment. *Kennedy Electric Co.* v. *United States Postal Service*, 508 F.2d 954 (10th Cir. 1974). Recognizing these purposes of the Miller Act, courts have at times extended the Act past its literal wording to accord federal court jurisdiction in situations where some normal Miller Act indicia (government land ownership and contracting) are absent. The foremost example in this circuit is the Capehart Housing situations where the lands on which construction took place were in private hands until construction was completed, then

passed immediately to the government. This arrangement was made in order to facilitate the congressional financing scheme for military housing. *Autrey* v. *Williams & Dunlap*, 343 F.2d 730 (5th Cir. 1965); *Lasley* v. *United States*, 285 F.2d 98 (5th Cir. 1960).

Mississippi Road Supply argues that the Capehart Housing cases indicate Miller Act jurisdiction is available anytime a project is a federal one. It asserts that because the funds here come from the government in the form of grants to Chata from the Economic Development Administration and are paid out through Chata to Morgan, government funding is present. This analysis, however, misses the mark. As succinctly pointed out in *United States* v. *Mattingly Bridge Co.*, 344 F.Supp. 459 (W.D.Ky.1972), government funding is not the whole answer. It must be true that either (1) the subcontractors and suppliers of material could assert an action for equitable recovery against the United States or one of its agencies, or (2) normal state labor and material lien remedies are unavailable because of federal ownership of the lands.

It is unclear whether these two indicia are present here. The parties have stipulated that record title to this land is in the United States. However, Chata holds a 25-year lease from a group acting with government agency approval. Although no liens can be asserted against the government's residual ownership, there appears to be no reason why a lien could not be asserted under state law against the leasehold interest of Chata, a private Mississippi corporation. Allowing such a leasehold lien to be affixed would be a breach of Chata's lease contract. The legal possibility that Chata could breach this obligation is clearly the reason why it was required to bond all improvement and maintenance work.

Mississippi Road Supply's argument that its position as a materialman of a subcontractor prevents the assertion of any state lien rights under Mississippi law also misses the

mark. The question is not whether the state grants lien rights to everyone who has anything to do with the project, but whether the federal government's involvement makes the assertion of a state-granted lien remedy ineffective or impossible.

As in *Mattingly*, the existence of government funding alone is not enough to allow a suit against the Economic Development Administration to recover payment from funds which may be allocated for this project. *See Kennedy Electric Co.* v. *United States Postal Service*, 508 F.2d 954 (10th Cir. 1974). However, the lease contract and 25 C.F.R. § 131.5(g)(1) muddle both of the above conclusions. Each requires that all of the lessee's obligations and the obligations of its sureties go to the United States as well as to the lessor of the land. Depending on its construction, such a clause could indicate either that this case deserves treatment similar to the Capehart Housing cases where the existence of jurisdiction has been recognized, or is controlled by *Mattingly* where jurisdiction was rejected.

We decline to resolve the issue in order to avoid creating a precedent that would stretch the Miller Act's jurisdictional grant to dimly-lit limits because under the facts in this record another statute contains a clear grant of jurisdiction.[3]

28 U.S.C. § 1352 gives district courts original jurisdiction of an action on a bond "executed under any law of the United States." This section is applicable where a regulation requiring a bond has the force of law. *United States ex rel. Empire Plastics Corp.* v. *Western Cas. & Sur. Co.* 429 F.2d 905 (10th Cir. 1970); *United States ex rel. Victory Electric Corp.* v. *Maryland Cas. Co.*, 215 F.Supp. 700 (E.D.

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[3] Where pertinent in the remainder of this opinion, we have considered the possibility that the existence of Miller Act jurisdiction would provide plaintiffs with some claim or defendants with some defense not available under the jurisdictional theory we adopt.

N.Y.1963). A regulation promulgated by the head of a department under a statute authorizing him to issue regulations is presumptively valid unless arbitrary, unreasonable, or plainly inconsistent with law. *Giancona* v. *Johnson*, 335 F.2d 372 (7th Cir. 1964). Because 25 C.F.R. § 131.5(c) was issued by the Acting Secretary of the Interior, 26 Fed. Reg. 10966 (Nov. 23, 1961), under the authorization of 25 U.S.C. § 415 (1963), *as amended* (Supp.1976), 25 C.F.R. § 131.5(c), it is a valid legislative rule and possesses the force of law. *See* 1 K. Davis, Administrative Law Treatise (1958) § 5.03. Since 25 U.S.C. § 415 provides that these lands owned by the United States could only have been leased to Chata subject to the provisions of 25 C.F.R. § 131 *et seq.*, Morgan's bond was required by a "law of the United States." Therefore, the district court possessed jurisdiction to entertain this action under § 1352.

Coverage of the Bond

The district court trial was conducted on the premise that the bond was one covered by the Miller Act. Under this assumption, it correctly ruled that the payment bond covered equipment rental and repairs due by a first tier subcontractor such as Young.[4] Since we do not reach the correctness of this premise, it is necessary to construe the cov-

[4] *Rental and repair: Illinois Surety Co.* v. *John David Co.*, 244 U.S. 376, 37 S.Ct. 614, 61 L.Ed. 1206 (1917) (equipment leased by a contractor and used on the project is "labor or materials" within the meaning of former § 270) [which remains substantially unchanged in this regard]; *Massachusetts Bonding & Ins. Co.* v. *United States ex rel. Clarksdale Machinery Co.*, 88 F.2d 388 (5th Cir. 1937) (equipment rentals and repairs to equipment are bond covered).

Recovery by materialmen of subcontractors: Clifford F. MacEvoy Co. v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163 (1944); *National Union Indemnity Co.* v. *R. O. Davis, Inc.*, 393 F.2d 897 (5th Cir. 1968) (suppliers not in privity with contractor but in privity with first tier subcontractor may recover on contractor's bond).

erage of this particular bond without assuming it was written up by operation of law to the statutory minimum coverage requirements the Miller Act would provide. There is no federal legislative standard for bonds "executed under any law of the United States," so we look to state law bond provisions and construction for guidance. Under Mississippi jurisprudence, private contract bonds are not required to extend payment coverage to any person not in privity with the prime contractor.[5] Our task here then is to decide where the instant undertaking falls between the extremes of certain coverage under the Miller Act and no coverage under Mississippi's private bond law.

The federal law under which the bond was required[6] suggests no purpose other than the normal good business practice of assuring project completion free of liens for unpaid labor and materials. Thus, the underlying statute furnishes no unique standard for coverage. On the other hand, the language of the lease contract required a bond be furnished for "payment in full of all persons for work performed in or materials furnished for construction."[7] Furthermore, the bond instrument itself secured "payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of the work . . . including all amounts due for . . . repairs on machinery, equipment tools, consumed in connection with the construction of such work . . . ."[8]

[5] Miss. Code Ann. § 85-7-185 (1972); *Alabama Marble Co.* v. *United States Fidelity and Guaranty Co.*, 146 Miss. 414, 111 So. 573 (1927).

[6] 25 U.S.C. § 415, and its implementing regulation, 25 C.F.R. § 131.5.

[7] See note 2, *supra*.

[8] The full bond undertaking was:

> Now, Therefore, if the principal shall promptly make payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecu-

The bond specifically guarantees payment for repairs made to project equipment. Although equipment rentals are not listed as a payable item in so many words, they are so closely analogous to repairs and equipment tools which are consumed in the work that there can be no serious question as to their inclusion under the normal rules of bond construction giving coverage for things of like kind to those enumerated and construing the agreement most strongly against the compensated surety. The amount of such rents are job expenses of the subcontractor and represent the approximate value of the equipment's useful life which is dedicated to construction of the project. The only significant limitation on the unusually inclusive guarantee of payment is that materials and equipment be consumed or used in connection with the construction of the work. Since this is also a requisite of Miller Act coverage, the district court has considered and resolved this disputed fact issue in favor of coverage.[9] That resolution was not clearly erroneous and decides the issue in the legal context we adopt as well.

We conclude that bond given by Morgan and USF&G to Chata provides protection for unpaid equipment rental and repairs to Mississippi Road Supply.

Statute of Limitations

Morgan and USF&G argue that the Miller Act one-year statute of limitations bars this action. Although we have

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tion of the work provided for in such contract, and any authorized extension or modification thereof, including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment tools, consumed or used in connection with the construction of such work, and all insurance premiums on said work, and for all labor, performed in such work whether by subcontractor or otherwise, then this obligation shall be void; otherwise to remain in full force and effect.

[9] See, *infra*, Sufficiency of the Evidence and Jury Instruction.

specifically pretermitted finding Miller Act jurisdiction, there is no need to remand for a determination of limitation rights under the § 1352 jurisdictional grant that authorized maintenance of this action in the district court. Assuming as we have, that the Miller Act is inapplicable here, there is no particular statute of limitations applicable to the bond required by 25 C.F.R. § 131.5(c). In such circumstances, we look to the state statute of limitations applicable to actions of a similar nature. *See Aboussie* v. *Aboussie*, 441 F.2d 150 (5th Cir. 1970); *Azalea Meats, Inc.* v. *Muscat*, 386 F.2d 5 (5th Cir. 1967); *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960). The Mississippi statute applicable to actions on contract bonds requires that the suit be filed within one year of either completion or abandonment of the project. Miss.CodeAnn. § 85-7-189 (1972). Under the specific instructions of the district court, the jury found on conflicting evidence that this suit was filed within one year of the last date Mississippi Road Supply's rental machinery was used on the project. That finding is supported by the record. A fortiori, the Mississippi Statute requiring suit within one year of project completion was also met. Therefore, under either view of the case, no statute of limitations barred this action.

The same logic answers Morgan's argument that the 90-day notice requirement of the Miller Act was not met. If this be a Miller Act case, the jury's determination (again made under adequate instructions from the trial court and on the basis of evidence in the record) that the required notice was given settled the issue.

Sufficiency of the Evidence

In several assignments of error, Morgan and USF&G assailed both the sufficiency of the evidence to support the verdict and the admissibility of certain portions of the evidence. These alleged errors are without merit. As noted above, the jury received evidence that would enable it to

find for Mississippi Road Supply if it chose to resolve documentary and testimonial conflicts in favor of that company. Given the court's instructions, the jury's verdict manifested just such a credibility choice, which we will not overturn. Further, the admission of documents disclosing equipment rentals to Young for a period beginning before his first appearance at the job site but extending until after that date was not error. The invoices and leases were introduced to prove that Young had rented the equipment and the cost of those rentals as well as the dates of use. The partial overlap indicates no incompatibility with rental by Young for use at the Chata site. In the absence of clear inconsistency between the lease dates and the commencement of work, the objections went to weight, not admissibility. Likewise, the objection to the introduction of certain of the invoices and leases by one of the witnesses is without merit because of the authentication of the invoices and their relation to the Chata job by other competent witnesses. At worst, then, the evidence was cumulative. The documents were properly admitted under limiting instructions granted by the trial court; and the selection among competing inferences was properly made by the jury.

Jury Instruction

Morgan and USF&G object to the following portion of the instructions:

> . . . so long as each piece of equipment remained on the contract, whether it was working or not, until the contract was completed or abandoned or the subcontractor was replaced. And that would be the determination date where the liability on the lease would expire . . .

(TR. 397). They rely on *United States ex rel. H. R. Martin* v. *F. D. Rich Co.*, 199 F.Supp. 939 (N.D.Fla.1961), *aff'd*, 308 F.2d 807 (5th Cir. 1962), to argue that merely having equipment on the job site is insufficient for purposes of Miller

Act recovery. This proposition may be true, but it did not render the instruction erroneous. There was uncontradicted evidence that this machinery had been used on the site. Read in context, the instruction went to whether the machinery had to be in continual use to be covered under the bond. The key element is whether the machinery was dedicated to use on this project. There was substantial evidence to justify a finding of such dedication. The court's instruction that it did not have to be in continual use was not erroneous. *See Mike Bradford & Co.* v. *F. A. Chastain Construction, Inc.*, 387 F.2d 942, 944 (5th Cir. 1968); *Fribel & Hartman, Inc.* v. *United States ex rel. Codell Construction Co.*, 238 F.2d 394 (6th Cir. 1956).

Rule 60(a) Remittitur

The district court instructed the jury on the mathematical computations necessary to determine appropriate damages should they rule in favor of Mississippi Road Supply Company. Although the jury ruled in favor of the company and clearly intended to award them all of the requested damages, an error in computation resulted in an award which was too large. Upon a Fed.R.Civ.P. 60(a) motion filed by Mississippi Road Supply, the district court reduced the jury's award to the appropriate amount. There was no error in this procedure. *See Continental Casualty Co.* v. *Little*, 152 F.2d 728 (5th Cir. 1946); *cf. Jamison* v. *Westvaco Corp.*, 526 F.2d 922, 927-32 (5th Cir. 1976); *Bowles* v. *Branick*, 666 F.Supp. 557 (W.D.Mo.1946).

Attorney Fees

On remand, 528 F.2d 926 (5th Cir. 1976), we requested the district court to clarify its attorneys' fees ruling. The language of its supplemental order suggests that the court entertained the misconception that the jury did not award attorneys' fees. The record discloses that the jury was instructed to award 15% attorneys' fees on the unpaid ren-

tals. That they did so is borne out by the amount of the verdict. Mississippi Road Supply's theory for recovering these fees was that since its contract with Young provided 15% attorneys' fees, this award was a bond-recoverable item.[10] However, under Mississippi law, unless a provision for the payment of attorneys' fees to claimants for labor or materials furnished to the project also appears in the bond, attorneys' fees may not properly be awarded in an action on the bond.[11] Within the parameters of the federal purpose for which the bond was required, state law provides the basis for interpreting the meaning of the bond with reference to attorneys' fees. *See Transamerica Insurance Co.* v. *Red Top Metal, Inc.*, 384 F.2d 752 (5th Cir. 1967).

The bond in question contains no specific reference to attorneys' fees. It is not benefitted by any general statutory language under which the payment of such fees might be authorized by fair judicial construction. Even under the more liberal rules of construction applicable in Miller Act cases, precedent indicates that the terms of this bond would not support an award of attorneys' fees. *See Transamerica Insurance Co.* v. *Red Top Metal, Inc., supra,* 384 F.2d at 757-58. Under either theory, the award of attorneys' fees was improper and the judgment entered on the corrected verdict must be reduced by the amount of this award.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[10] The pertinent rental agreement clause provides:

> Should any legal proceeding be instituted by LESSOR to recover any monies due and to become due hereunder and/or for possession of the equipment, LESSEE shall pay a reasonable sum (15%) of the amount sued for (if not prohibited by law) as Attorney's fees, to be not less than $50.00.

[11] *Faulkner Concrete Pipe Co.* v. *United States Fidelity & Guar. Co.*, Miss., 218 So.2d 1 (1968).

APPENDIX C

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 74-3761.

UNITED STATES OF AMERICA, FOR AND ON BEHALF OF MISSISSIPPI ROAD AND SUPPLY CO., *Plaintiff-Appellee*

v.

H. R. MORGAN, INC., U.S. FIDELITY AND GUARANTY CO. AND BOBBY GRAY YOUNG, ETC., *Defendants-Appellants.*

March 5, 1976.

• • • • • • • • • • •

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM:

In this suit upon a general contractor's bond by a subcontractor's supplier, which resulted in verdict and judgment for the plaintiff, several alternative bases for federal jurisdiction of the cause were asserted. Plaintiff's primary reliance was on the Miller Act, 40 U.S.C. §§ 270a & b (1970). However, this is not a garden-variety Miller Act transaction. The United States was not a party to the contract and the bond sued on runs in favor of Chata Development Corporation, a Mississippi corporation, rather than the United States. Plaintiffs nevertheless assert that Miller Act jurisdiction obtains, relying on a number of cases in which conditions of federal ownership of the construction site or the degree of federal involvement with the construction project were reasoned to make the protections of the Miller Act available and permit use of its jurisdictional grant. *Compare, e. g., United States ex rel. Miller* v. *Mattingly Bridge Co.*, 344 F.Supp. 459 (W.D.Ky.

1972) with *United States ex rel. Gamerston & Green Lumber Co.* v. *Phoenix Assurance Co.*, 163 F.Supp. 713 (N.D. Cal. 1958).

Prior to the trial of this case, defendants submitted a motion to dismiss for want of jurisdiction. Both sides submitted briefs; oral argument on the issue was waived. The district court held that Miller Act jurisdiction attached. However, the court's order gave no indication of the basis for its decision on the jurisdictional issue. In addition, the record contains only a casual reference to the title ownership of the construction site lands. Since prior cases frequently have turned on this factual fulcrum, it is vital to a proper determination of the jurisdictional issue for the record to be properly developed and a decision made by the district court as to record ownership of the site. Accordingly, we remand this portion of the case to the district court for the appropriate factual development and determination and a reconsideration of the jurisdictional issue in light of that determination.

In a similar vein, we note that the judgment of the district court included an award of attorneys' fees. Again, neither the factual nor the legal basis for this award appears in the record. Upon remand, therefore, should the district court once again find that the case was properly before it, it should conduct any further proceedings that it may determine to be necessary to enable the district court to make findings of fact and conclusions of law disclosing the basis for its decision to award attorneys' fees to the plaintiff.

Of course, we express no opinion at this time as to the proper result of these or other factual or legal determinations. We retain jurisdiction of all other aspects of this appeal.

Remanded with directions.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. 73E-55(C)

UNITED STATES OF AMERICA for and on Behalf of MISSISSIPPI ROAD SUPPLY COMPANY, *Plaintiff*

v.

H. R. MORGAN, INC., ET AL., *Defendants*

This controversy involves a claim asserted against the contractor on which a jury awarded the plaintiff a lump sum amount. The contractor appealed to the United States Court of Appeals for the Fifth Circuit and that Court, while retaining full jurisdiction of the case, remanded a segment thereof to this Court for clarification as to jurisdiction and as to attorney's fees.

The question of attorney's fees will be first discussed. On the recent hearing here, nothing was entered into the record on the question of attorney's fees by either side. An examination of the form of the verdict submitted to the jury for their filling out was examined, and the award by the jury does not indicate any allowance for attorney's fees. An examination of the payment bond does not indicate any provision therein for an attorney's fee. That question is resolved by the laws of the state of Mississippi. Under the laws of Mississippi, this payment bond does not obligate the contractor and surety to pay any attorney's fee. Obviously, the form was prepared by some paid surety company.

The question of the jurisdiction of this Court presents a vastly more difficult and complicated question. This Court held that under the facts and circumstances in the

case that this case was and is a Miller Act case although the bond named a private Mississippi corporation (Chata Development Company) as obligee and not the United States. The legal title to the land on the site of this construction is the United States of America, but the United States leased this land to Chata Development Company for twenty-five years under the terms and conditions provided by the Secretary of Interior under CFR, Title 25 (Indians), part 131 with provision for extension. Under Mississippi law a lease is pro tanto a deed. With those considerations fully in mind, this Court is of the opinion that the project in suit was and is under any view public work within the purview of the law. The Congress of the United States through the last several years as shown by this record has appropriated to this public work several millions of dollars in addition to the initial purchase price of land. This project is basically and essentially an industrial park provided by the United States to rehabilitate this impoverished segment of society consisting of these Indians who did not elect to leave this area and go to Oklahoma at another time.

It is not unthinkable that this contractor and its surety should be effectually released from this large bond which this surety provided for a vast premium amounting to several thousand dollars. A state court would surely have no jurisdiction whatever of this suit on this bond under these circumstances. The Court understands that the Department of Interior actually provided this bond form and surely knew absolutely nothing about the law in so doing.

42 U.S.C.A. § 3121 et seq. set forths the findings and purpose of the Public Works and Economic Development Act of 1965. The bond before the Court is surely a hybrid form in any most charitable view, but it may not be gainsaid that this project for which this bond was required and paid in public money was a public works project in every

sense of the word. Surely, Chata was not a suitable substitute for the United States of America, but we must examine the statutes for a cognate set of rules and principles which snugly fit and apply to the project here. It may not be denied that this Court has jurisdiction of this suit and this bond which was surely executed on this public work project to an ill-advised obligee. That is the clear import and provision of 28 U.S.C.A. § 1352 which provides: "Bonds executed under federal law—the district courts shall have original jurisdiction concurrent with state courts, of any action on a bond executed under any law of the United States." This rule of cognate construction and application was invoked and applied by this Circuit in *Morris W. Lasley* v. *United States,* (5CA) 285 F.2d 98 in applying the Miller Act provisions to a Capehart Housing Project at Fort Bliss, Texas. That last mentioned case was followed by this Circuit in *R. L. Autrey, et al* v. *Williams & Dunlap, et al,* (5CA) 343 F.2d 730.

In *Peterson* v. *United States,* (6CA) 119 F.2d 145, the Court defined "public work" under the Heard Act as including any work "in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds."

In *United States* v. *Irwin,* 316 U.S. 23, 62 S.Ct. 899, the Supreme Court had before it a question of whether or not a library building on the campus of Howard University in the District of Columbia was or not a public work. On August 24, 1935, Congress passed the Miller Act. The Secretary of Interior approved the building and allotted $1.120,811.58 to its construction. The Assistant Secretary of Interior on behalf of the United States entered into a contract for the construction of the building. In a suit on the payment bond, the defense was interposed that the library building at Howard University was not a public work within the meaning of the Miller Act. The Court of Appeals reversed the trial court. The Supreme Court

agreed with the trial court and reversed that decision and held that the petitioner was entitled to sue on the bond in the name of the United States. The Court said: "No aid in ascertaining the meaning of public works is to be found in the Miller Act itself. But the National Industrial Recovery Act, passed two years before the Miller Act, Congress defined it as including 'any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interest of the general public.' The library at Howard University was not only a project 'of the character heretofore constructed or carried on * * * with public aid;' it had been directly and specifically authorized by Congress in 1931 and money had actually been appropriated for it." * * * "Since Howard University is a private institution and since it held title to the dormitories, recovery on the bond was denied to the suppliers of materials and labor. Whatever may have been the validity of this narrow formula when applied to the Heard Act, we cannot approve its application to this suit under the Miller Act. The court observed that in the passage of the Miller Act that a Congressman said that if it were passed by Congress, it would certainly be applicable to the public works program and this is the reason for its importance." The Court in sum said that the administrator had the right to require the bond and was entitled to bring this suit on it.

The motions of the contractor and its surety to dismiss for lack of jurisdiction are without merit and each is denied. This Court has never had presented to it at anytime any question as to attorney's fees on this payment bond.

An order accordingly may be presented by the plaintiff under the rules of this Court.

/s/ HAROLD ORR
UNITED STATES DISTRICT JUDGE

August 5, 1976

APPENDIX E

Code Of Federal Regulations, Title 25, Indians, Part 131, § 131.5 (a), (c), (g)

(a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

. . . . . .

(c) Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing.

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

. . . . . .

(g) All leases issued under this part shall contain the following provisions:

(1) While the leases premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of his sureties, are to the United States as well as to the owner of the land.

. . . . . .

APPENDIX F

§ 85-7-185 Miss. Code Ann. (1972) Bond-Provisions—Right To Intervene In Action On Bond

When any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm, or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless unure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond, and any such person who has furnished labor or materials used therein; for which payment has not been made, shall have the right to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority or the rights or claim for damages or otherwise, of the obligee. The bond herein provided for may be made by any surety company authorized to do business in the State of Mississippi.

Supreme Court, U. S.
FILED
JUL 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1689

H. R. MORGAN, INC., and UNITED STATES FIDELITY AND GUARANTY CO., *Petitioners*

v.

UNITED STATES OF AMERICA, for and on behalf of MISSISSIPPI ROAD SUPPLY CO., *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA, for and on behalf of MISSISSIPPI ROAD SUPPLY CO., *Respondent*

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---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. R. Morgan, Inc. ("Morgan") and United States Fidelity and Guaranty Company ("USF&G"), petitioners, have filed a petition for writ of certiorari with this Court. Respondent, United States of America for and on behalf of Mississippi Road Supply Co. files this response to the petition and says that the petition should not be granted by this Court because the decision of the Fifth Circuit (1) is not in conflict with any decision of any other court of appeals or any decision

of this Court; (2) involves an interpretation of the language of a specific payment bond consistent with Mississippi bond law standards; and (3) does not have wide application or impact outside the interpretation of the specific terms of the bond.

I.

OPINIONS BELOW

The opinions below are adequately set forth in the petition.

II.

JURISDICTION

The statement of jurisdiction is adequately set forth in the petition.

III.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The statement of constitutional provisions, statutes and regulations is adequately set forth in the petition.

IV.

QUESTIONS PRESENTED

Whether the decision of the Fifth Circuit is correct in finding federal court jurisdiction under 28 U.S.C. § 1352.

Whether or not the Fifth Circuit decision conflicts with any decision of this Court or any court of appeals.

Whether the decision of the Fifth Circuit is in conflict with state law as it relates to interpretation of the specific language and coverage of payment and performance bonds.

V.

STATEMENT OF THE CASE

Except where noted below, the statement of the case made by petitioners adequately states the background facts of the case.

In footnote 1 of the statement of the case petitioners state that respondent never contended that Chata was anything but a private non-profit Mississippi corporation. In fact, respondent argued at every stage of this litigation that the federal court had jurisdiction under the Miller Act because the federal involvement in the project was so pervasive that Chata was the instrumentality of the United States. *U.S. ex rel Gamerston & Green Lumber Co.* v. *Phoenix Assurance Co.,* 163 F. Supp. 713 (N.D. Cal. 1958). However, since the lower court's decision was based on § 1352, and not the Miller Act, the status of Chata is not particularly important.

Petitioners make the point on page 5 of the petition that the contract between H. R. Morgan, Inc. and Chata was made before the effective date of a certain Economic Development Administration regulation requiring a payment and performance bond. This is irrelevant to the questions presented to this Court because the Fifth Circuit did not base its finding of federal jurisdiction on the EDA regulations cited by petitioners, or any other EDA regulation.

Petitioners fail to mention in their statement of the case that the land on which the project in question was constructed *was and is owned by the United States.* In fact, the first time the case was heard by the Fifth Circuit the court specifically remanded with directions

that the lower court make a factual determination as to who owned the land. Appendix C at 16a.[1]

Petitioner's statement of the case might give the Court the impression that the respondent had never asserted jurisdiction under 28 U.S.C.A. § 1352 prior to the remand of the Fifth Circuit. In fact, shortly after the complaint was filed it was amended by respondent to allege jurisdiction under three alternative jurisdictional grounds, Miller Act 40 U.S.C.A. § 270(a) and § 270(b); 28 U.S.C.A. § 1352 and 28 U.S.C.A. § 1337. Of course, the Fifth Circuit decision is based upon § 1352, which gives the federal court original jurisdiction of any action on a bond executed under any law of the United States.

The last paragraph of the statement of the case by the petitioners implies that the Fifth Circuit interpreted the U.S.F.&G. payment bond under principles of federal common law, without regard to Mississippi bond law. This is not the case and, in fact, the Fifth Circuit's interpretation of the specific language of the payment bond is the same interpretation that would have been reached had the case been considered by a Mississippi court.

VI.

ARGUMENT

A.

THE FIFTH CIRCUIT DECISION IS CORRECT

The Fifth Circuit decision did not deprive the petitioners of due process under the Fifth Amendment.[2]

[1] Except where otherwise noted in n. 7, reference is made to the appendices attached to the petition.

[2] The theory that petitioners now argue that they were deprived of property without due process of law in violation of the Fifth Amendment was *never* presented to the district court or the Fifth Circuit. This theory is now used by petitioners in a roundabout way to attack the basis of federal jurisdiction, i.e., that the bond was executed pursuant to federal law. Argument based on an alleged deprivation of Fifth Amendment rights is improperly raised for the first time here and should not be considered by the Court. *Mitchell* v. *Louisiana*, 350 U.S. 91 (1958); cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, reh. den. 389 U.S. 889 (1967).

Petitioners assert that the payment bond in question was not a bond required by federal law, and therefore that the federal court never had jurisdiction. In support of this theory, petitioners claim that they were deprived of due process under the Fifth Amendment because the bond which was required was the bond of Chata and not Morgan, and that the bond required by the federal regulation was a performance bond and not a payment bond. Second, petitioners claim they were deprived of due process because they had no notice of the terms of the lease agreement.

In answer to the first point it should be noted that the Fifth Circuit very carefully traced the § 1352 basis of federal jurisdiction in its opinion. The requirement of the bond came from 25 U.S.C. § 415, as amended (Supp. 1976), through its implementing regulation 25 C.F.R. § 131.5(c), which the court concluded was a valid legislative rule and possessed the force of law. *United States ex rel. Empire Plastics Corp.* v. *Western Cas. & Sur. Co.*, 429 F.2d 905 (10th Cir. 1970); *United States ex rel Victory Electric Corp.* v. *Maryland Cas. Co.*, 215 F. Supp. 700 (E.D. N.Y. 1963) and *Giancona* v. *Johnson*, 335 F.2d 372 (7th Cir. 1964). Appendix B at 8a.

25 C.F.R. 131.5(c) required that the Secretary of Interior see that a "surety bond" was furnished "guar-

anteeing" the "estimated construction cost of any improvement to be placed upon the land by the lessee." Appendix B at 3a. The statute and regulation were further implemented through ¶ 12(c) of the lease agreement between the Mississippi Band of Choctaw Indians and Chata which requires the lessee to "provide security which will guarantee completion of the improvement, and payment in full of claims of all persons for work performed in or materials furnished for construction." Appendix B at 4a.

The Secretary of Interior required a "surety bond" to guarantee the cost of improvements. The lease agreement required Chata to provide security to guarantee the completion of the project and payment of all persons for work and materials furnished. Chata was not the contractor, it was the owner lessee. Chata hired a general contractor, Morgan, to build the project. To comply with the federal regulation, Chata required payment and performance bonds from its contractor. A payment and/or performance bond from the contractor constructing the improvement is the only way, consistent with normal usage and procedure in the construction industry, that Chata could comply with the regulation. The federal regulation merely requires the guarantee of the estimated cost of any improvement. It does not, of course, say whether this is done by a performance bond or a payment bond, or both.[3]

[3] In fact, Chata (because of the federal regulation) required Morgan to provide both a payment bond and a performance bond. Exhibit P-1 Contract Documents & Specifications, Chata Industrial Parl Pearl River Indian Reservation, Neshoba County, Miss., Contract C—Water Sewer & Site Improvements—E.D.A.—Project No. 04-1-00836—December, 1971.

With respect to the second point of petitioners that they were denied due process because they had notice of the terms of the unrecorded lease agreement, the Fifth Circuit decision was based on the terms of the payment bond itself, and not the lease agreement. In fact the lower court used the language of the lease agreement primarily to show the direct link between the bond and the federal regulation which required it. Of course, U.S.F.&G. and Morgan were well aware of the terms of the payment bond and also that it was required by Chata. They were also well aware that this was a 100% EDA funded project on a U.S. Indian Reservation. As noted above, the language in paragraph 12(c) of the business lease merely implemented the federal regulation which required a surety bond to guarantee the estimated construction cost. Certainly part of guaranteeing the estimated construction cost is guaranteeing that all persons who supply material and labor going into the construction are paid.

B.

THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY SUPREME COURT DECISON OR ANY OTHER COURT OF APPEALS DECISION

Petitioners state that one of the reasons why certiorari should be granted in this case is because the decision of the Fifth Circuit creates a conflict between decisions of this Court, decisions of other courts of appeal, and a decision of the Fifth Circuit itself. However, this alleged conflict is based on the erroneous assumption that, by its decision, the Fifth Circuit "overrode" Mississippi bond law. As will be seen below, this was not the case. The result reached by the

Fifth Circuit is harmonious with Mississippi court decisions which have considered similar bond language.

The two decisions relied on by petitioners, *United States* v. *Yazell*[4] and the *Bank of America National Trust and Savings Association* v. *Parnell*[5] concern questions of whether federal common law should take precedence over a contrary state law rule, considering the degree of involvement of the federal government in the particular transactions. In both of these cases this Court said no.[6] Reliance on these decisions is inappropriate in the present case, which was decided on the specific language of the payment bond in light of state law and not on broad principles of federal common law.[7]

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[4] 382 U.S. 341 (1966).

[5] 352 U.S. 29 (1956).

[6] Petitioners also cited the landmark case of *Clearfield Trust Company* v. *United States*, 318 U.S. 363 (1943) in which this Court said that federal common law should prevail in a situation involving programs or actions which by their nature require uniformity and character throughout the nation.

[7] However, there was ample federal involvement in the construction of this project to warrant the application of federal common law principles to allow recovery by Mississippi Road. Although application of federal common law was not necessary because the language of the payment bond itself was broad enough to include Mississippi Road in its production, it is helpful to point out to the Court some examples of federal involvement:

(a) The lease contract covering the construction site lands, entered into between the Mississippi Bank of Choctaw Indians and Chata, a Mississippi non-profit corporation, whose members were all Choctaw Indians, was approved by the United States by its Department of the Interior. Appendix A at 1a. (References are to Appendix A attached to this response.)

(b) The lease is on a form provided by the United States Department of Interior and recognizes that the federal trust responsibilities with respect to the land should continue unless terminated

To illustrate the alleged conflict within circuits, petitioners cite *Rader* v. *Manufactures Cas. Ins. Co.*, 242 F.2d 419 (2nd Cir. 1957) and *United Bonding Ins.*

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by issuance of a fee patent. Appendix A at 6a, ¶ 13.

(c) The lease provided that all of the parties thereto and the Secretary of the Interior recognized the exceptional nature of the project embraced in part by the lease, "in that the lease does not relate to a mere real estate lease venture, but rather an important and valuable integral industrial-manufacturing business projected in a depressed labor area, with adequate provision contained in this lease for the preferential employment of enrolled members of the Mississippi Band of Choctaw Indians." Appendix A at 3a, ¶ 6.

(d) The lease provided that the rental shall be regularly reviewed and adjusted under 25 C.F.R. 131.8 by the Secretary of the Interior. Appendix A at 3a, ¶ 6.

(e) The said lease recognized the federal trust responsibility and provided that so long as the leased premises are in trust or restricted status, all of the lessee's obligations under the lease are to the United States. Appendix A at 8a, ¶ 21.

(f) The lease provided that no improvements may be constructed on the land except with the written consent of the United States. Appendix A at 4a, ¶ 11.

(g) The said lease provided that the United States shall have the right of inspection of the leased premises at all times. Appendix A at 7a, ¶ 17.

(h) The federal bureaus, agencies, and departments involved furnished the general plans and specifications for the construction. R. 34 to 37.

(i) The federal bureaus, agencies, and departments involved supervised and otherwise participated in the payment of the contractor, sub-contractors, laborers and materialmen. R. 36-37.

(j) The federal bureaus, agencies, and departments involved employed the engineer and otherwise supervised and participated in the construction of the project. R.36-37.

(k) The United States supplied all of the funds for the project and the total cost of the construction of the project was paid for by funds of the United States. R. 35-36.

(l) The said lease provided that the improvements shall become a part of the real property. Appendix A at 4a ¶ 11.

(m) Said lease provided that breach of the lease shall be acted upon in accordance with the Code of Federal Regulations, Title

Co. v. *Alexander,* 413 F.2d 1025 (5th Cir. 1969). Again, reliance on these cases by petitioners is misplaced. In *Rader,* the plaintiffs were suing on some agreements made at the same time as a bail bond, which was required by federal law. The court said that it had no § 1352 jurisdiction in a case where the § 1352 bond (which, in fact, existed) was *not* being sued on. The court said:

> Plaintiffs, by their present action attack the validity of the indemnity agreement dated November 30, 1949, the confession of judgment dated December 1, 1949 and the agreement of June 12, 1952. None of these were required to be executed by any law of the United States in connection with the giving of a surety bail bond. The various agreements under attack are collateral arrangements of the surety and indemnitors and were executed to afford protection to the defendant surety company and its agents and did inure to the benefit of the United States. 242 F.2d at 427.

Likewise, the Fifth Circuit's decision in *United Bonding* found that § 1352 could not be used as the basis of federal jurisdiction for a "subrogation" action

25, Part 131. Appendix A at 6a ¶ 15.

Respondent argued to the district court and the Fifth Circuit that the degree of federal involvement in this project (i.e. land owned by United States and project paid for 100% by United States) would support Miller Act jurisdiction and, concurrently, jurisdiction under § 1352. *Autrey* v. *Williams & Dunlap,* 343 F.2d 730 (5th Cir. 1965); *Lasley* v. *United States,* 285 F.2d 98 (5th Cir. 1960). Even if the lower court's ruling on the bond's coverage had been in conflict with state law, which it was not, the pervasiveness of the federal interest in this project, and other similar projects, would have justified the application of federal common law to insure the "payment in full of claims of all persons for work performed in or materials furnished for construction." Appendix A at 5a ¶ 12(c).

by a bonding company against certain employees of the post office department. The bonding company, which had executed a § 1352 fidelity bond, had voluntarily paid off (under the bond) for losses from alleged fraudulent activities of these employees and was attempting to bring a subrogation action against the employees to get its money back. The court said that an action under § 1352 had to be "on the bond" and that this subrogation and tort action against the employees was not on the bond which was required by a federal regulation. The other cases cited by petitioners in their brief[8] are likewise all based on the theory that the lower court applied a federal common law standard that was contrary to state law and are, therefore, inapplicable to this case.

Of course, the suit in this case is "on the bond" of U.S.F.&G. and Morgan, which was required by federal regulation. The existence of § 1352 jurisdiction could not be clearer.

C.

THE FIFTH CIRCUIT'S INTERPRETATION OF THE COVERAGE OF THE BOND WAS CONSISTENT WITH STATE LAW

As noted above, there can be no question of § 1352 jurisdiction in this case, in that the payment bond was required by federal law and that this actions is based on that bond.

Petitioners misconceive the importance of this case by terming it a landmark decision in the area of fed-

[8] *Highland* v. *Russell Car & Snow Plow Co.,* 279 U.S. 253 (1929); *Adams* v. *Greeson,* 300 F.2d 555 (10th Cir. 1962); *Maternally Yours* v. *Your Maternity Shop,* 234 F.2d 538 (2d Cir. 1956); and *Lvick* v. *Graybar Electric Co., Inc.,* 473 F.2d 1360 (8th Cir. 1973).

eral common law. The portion of the lower court's decision dealing with the "coverage" of the bond reveals that, quite to the contrary, it was based upon a reading of the specific language in the payment bond which was drafted by the surety. The lower court relied most strongly on and quoted from the payment bond itself, which secured "payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of work . . . including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment, tools, consumed in connection with the construction of such work . . . and for all labor, performed in such work whether by subcontractor or otherwise . . . ." Appendix B at 9a.

While it is true that a private payment bond in Mississippi is not required by statute to extend payment protection to anyone who is not in privity with the prime contractor,[9] the bonding company is free to draft its payment bond to extend coverage to people not in privity with the prime contractor, like people who rent equipment to subs of the contractor and keep the equipment repaired. Likewise, the bonding company is free to include language in its bonds which will provide coverage for repairs on equipment and equipment rental. In Mississippi, when the language of the bond so extends its coverage then the bonding company is liable for the payment of these items. *Linde Air Products Co.* v. *American Surety Co.*, 168 Miss. 877, 152 So. 292 (1934); *Shuptrine* v. *Jackson Equipment & Service Co.*, 168 Miss. 464, 150 So. 795 (1933); and

[9] Miss. Code Ann. § 85-7-185 (1972); *Alabama Marble Co.* v. *United States Fidelity & Guaranty Co.*, 146 Miss. 414, 111 So. 573 (1927).

Seaboard Surety Co. v. *Bosarge*, 226 Miss. 482 84 So. 2d 517 (1956). On the other hand, when the language of the bond is not broad enough to extend the protection to people who provide equipment to a sub of the contractor and repair that equipment, the Mississippi court has held that the bond did not cover these items. *Carruth* v. *Standard Accident Ins. Co.*, 329 F.2d 690 (5th Cir. 1964). The lower court, basing its decision on the language of the bond itself, held that it protected the respondent.

Therefore, the decision of the Fifth Circuit in this case was consistent with the interpretation that would be given to the bond under Mississippi law by a Mississippi court. Even though there is federal jurisdiction because the bond was executed pursuant to a law of the United States, this does not mean that the lower court's interpretation of the specific language of the bond would have any far reaching significance or impact on a federal court considering the same type of situation, with different bond language, in another state. In most, if not all states, the language of the bond would control, especially when the bond language extended the coverage required by statute or rule of law in the state. This decision is particularly unsuited for certiorari because the decision in the case turned on such a unique and limited point i.e., the specific language of the U.S.F.&G. payment bond.

CONCLUSION

The Fifth Circuit decision as to the coverage of the bond was not based on federal common law. To the contrary, the decision of the Fifth Circuit was based on specific bond language drafted by the surety, consistent with Mississippi bond law. The fact that the federal court had jurisdiction under § 1352 is clear because of the implementing regulation.

This case is not appropriate for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MISSISSIPPI BAND OF CHOCTAW INDIANS
PHILADELPHIA, MISSISSIPPI

Business Lease Contract

THIS CONTRACT, made and entered into this 13th day of August, 1970, by and between the MISSISSIPPI BAND OF CHOCTAW INDIANS, acting through its duly authorized Tribal Chairman and Secretary (hereinafter called the Lessor), and CHATA DEVELOPMENT COMPANY, chartered December 7, 1969 under the State laws of Mississippi, with its principal place of business at Philadelphia, Mississippi (hereinafter called the Lessee), as provided in Tribal Council Resolution No. Cho. 55-69, adopted April 8, 1969 under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior in the Code of Federal Regulations, Title 25, Indians, Part 131, and any amendments thereto relative to leases on restricted Indian lands which by reference are made a part hereof.

WITNESSETH:

1. DEFINITIONS

(a) "Secretary" means the Secretary of Interior or his authorized representative.

2. PROPERTY LEASED

For and in consideration of the payment of the rents and other charges and the performance of all the covenants of this lease by the Lessee, Lessor hereby leases to the Lessee all of that certain property and rights, licenses,

privileges, easements and appurtenances thereto, thereon or created for the benefit thereof (collectivly referred to as "property"), which premises are legally described in that certain survey as: E½ NW¼ NE¼, Section 30 T. 11N, R 11E; and SE¼; SW¼ SE¼, Section 19, T. 11N, R.11E, 30 acres, m/l.

3. Term Of Lease

Subject to the terms and conditions herein, the property is leased for a term of twenty-five (25) years, beginning on the first day of the month following the date that this lease is approved by the Secretary of the Interior or his authorized representative, with an option in the lessee to renew for an additional period of twenty-five (25) years as hereinafter provided.

4. Renewal

This lease may be renewed at the option of the Lessee, pursuant to paragraph 3, at the expiration of the original term, for an additional period of twenty-five (25) years, under the same terms and conditions as expressed herein; provided, however, that notice of said option shall be given by the Lessee to the Lessor and the Secretary in writing at least six (6) months prior to the expiration of the original term of this lease.

5. Rental

Lessee agrees to pay to the Lessor as consideration for the use and occupancy of the above described property under this lease, rental as follows:

(a)

(b) In the event that lessee fails to pay any installment of any of the sums due hereunder as rental or otherwise for a period of thirty (30) days after the same becomes due, then, at the option of the Lessor,

all of the remaining installations due hereunder shall become due and payable at once, together with interest thereon at the rate of six percent (6%) per annum until paid in full.

6. Rental Adjustment

All parties hereto and the Secretary recognize the exceptional nature of the project embraced in part by this lease, in that the lease does not relate to a mere real estate lease venture, but rather an important and valuable integrated industrial-manufacturing business projected in a depressed labor area, with adequate provision contained in this lease for the preferential employment of enrolled members of the Mississippi Band of Choctaw Indians. All parties hereto and the Secretary agree that the rentals provided herein shall be subject to review and adjustment under 25 CFR 131.8 by the Secretary at not less than five year intervals.

7. Use Of Premises By Lessee

(a) Lessee shall use the property for the purpose of future product lines which may be added from time to time during the term of this lease. In view of the relatively long term and renewal term of this lease, the preceding sentence shall not be deemed to restrict or limit the bona fide business purposes for which the property be used; provided, however, that at no time shall Lessee's business upon the property omit noxious or dangerous odors or substances or constitute a nuisance.

(b) Lessee may install or cause to be installed vending machines in the building and in the employees cafeteria for dispensing of soft drinks, coffee, sandwiches, candy and cigarettes, etc.

8. Unlawful Conduct

The Lessee agrees that it will not use or cause to be any part of said property for any unlawful conduct or purposes.

9. Subleasing-Illegal Assignments-Transfers

No assignments or amendments of this lease or an interest therein may be made except with the approval of the Secretary and the written consent of all parties to this lease; provided, however, that Lessee shall have the right to sublet all or any part of the premises to any of its wholly-owned subsidiaries or subsidiaries in which it may own 66-⅔% or more of the voting stock.

10. Delivery Of Premises

It is understood and agreed that at the termination of this lease, by normal expiration or other wise, the Lessee shall peaceably and without legal process deliver up the possession of the premises herein described, inclusive of the improvements, in good condition, reasonable wear and tear, normal damage by the elements and acts of God excepted.

11. Improvements

(a) Lessee shall have the right to erect other buildings on the property at its own cost and expense with the written consent of the Lessor and approval of an authorized representative of the Secretary of the Interior as to the location and type of building to be constructed, said buildings to become part of the real property. Such approval will not be unreasonably withheld. Any construction should comply with local zoning laws and building codes.

(b) It is understood and agreed that the Lessor is relieved of any responsibility for the cost of repairs, alterations or remodeling of buildings, fixtures or equipment for operation of this business project.

12. Insurance Liability And Surety Bond

(a) The Lessee during the period of this lease shall at Lessee's expense keep in force and effect a public liability insurance policy providing for bodily injury and property damage in minimum limits of $100,000/$300,000 for personal injury and $100,000 for property damage, said policy to be written jointly to protect Lessor and Lessee in a company selected by Lessor and Lessee, and Lessee agrees to save and hold harmless the Lessor and the United States from any and all liability in excess of the amount of the policy.

(b) Lessee shall, from the date of aproval of this Lease carry fire insurance with extended coverage endorsements, and vandalism, pointly in the names of the Lessee and Lessor, covering the full insurable value of all improvements on the leased premises. Said policy or policies shall be deposited with the Secretary, and Lessee shall pay all premiums and other charges payable in respect to such insurer, and shall deposit with the Secretary the receipt for each premium or other charge as paid, or satisfactory evidence thereof. In the event of damage to any improvement on the leased premises, the Lessee shall reconstruct the improvement in compliance with applicable laws and building regulations and in accordance with plans to be approved by the Secretary. Such reconstruction shall commence within one (1) year after the damage occurs and shall be pursued diligently.

(c) Before commencement of construction of each improvement on the leased premises, Lessee agrees to provide security which will guarantee completion of the improvement, and payment in full claims of all persons for work performed in or materials furnished for construction. Lessee may provide said security by posting a

corporate surety bond in an amount equal to the cost of improvement, said bond to be deposited with the Secretary and to remain in effect until the improvement is satisfactorily completed. Said bond shall be conditioned upon the faithful performance of Lessee, and give all claimants the right of action to recover upon said bond in any suit brought to foreclose mechanic's or materialmen's liens against the property. Upon approval of this lease by the Secretary, the Lessee agrees to post a corporate surety bond in a penal sum of not less than one year's minimum rent.

13. Relinquishment Of Supervision By The Secretary

Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate or modify the lease. The owners of the land and the lease shall be notified by the Secretary of any such change in the status of the land.

14. Interest Of Members Of Congress

No Members of, or Delegates to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

15. Violation Of Lease

It is understood and agreed that unless otherwise provided herein violations of this lease shall be acted in accordance with the regulations in 25 CFR 131.

16. Assent Not Waiver Of Future Breach Of Covenants

No assent, express or implied, to any breach of any of the Lessee's covenants, shall be deemed to be a waiver of any succeeding breach of any covenants.

17. Inspection

Upon twenty-four (24) hours notice to Lessee, duly appointed representatives of the Lessor and of the Secretary shall be granted entrance to the property for the purpose of carrying on any inspection deemed necessary and reasonable to assure that reasonable protection, maintenance, fire and safety controls are in effect and the provisions of this lease are being complied with.

18. Maintenance

Lessee shall at all times at Lessee's own expense, keep all buildings, improvements, machinery and equipment on the leased property in a state of good repair and shall surrender said property at the end of the term in said condition, ordinary wear and tear, casualty and removal by virtue of obsolescence or disrepair excepted. Lessee shall be obligated to make all necessary repairs and replacements (whether of a minor or major nature) to maintain the property in the condition required above at Lessee's expense. Lessee shall comply with the laws, ordinances and regulations of the State, County and municipality wherein the property is located, with regard to sanitation, construction, licenses or permits to do business and all other matters.

19. Liens

The Lessee further contracts and agrees that all bills for labor and materials incurred in the construction of any buildings, or in the maintenance of the property shall

be paid promptly as the same becomes due and payable and that no mechanics', laborers', or materialmen's liens will be permitted to accrue.

20. Taxes And Utilities

Lessee further covenants and agrees to bear, pay and discharge, in addition to the rent herein reserved, all applicable taxes, assessments, charges and levies of every name, nature and kind, including water rents and charges for public utilities, which may be taxed, charged or assessed against said property, or upon any of the buildings or improvements thereof, or which may be levied or imposed upon the leasehold estate hereby created during the term hereinbefore granted.

21. Upon Whom Binding

It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, successors, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, are to the United States as well as to the owner of the land.

22. Employees Preference

Subject to Lessee's rules for hiring and firing employees, a copy of which shall be filed and maintained with the Superintendent of the Choctaw Indian Agency, Lessee covenants and agrees that it will, in the hiring of 100% of its employees, give first preference to enroll members of the Mississippi Band of Choctaw Indians so long as and to the the extent that they are available, qualified and willing to work. Lessee will, to the extent and for such period it considers it necessary and practicable, participate in the Bureau of Indian Affairs' On-The-Job Training Program consistent with industrial

training standards in the particular industry for the purpose of training employees for specific jobs which it is anticipated will lead to full-time employment with the Lessee. Lessee further agrees to pay employees in accordance with provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060). Giving first preference to employment of enrolled members of the Mississippi Band of Choctaw Indians is the purpose and essence of this lease contract.

23. Possession And Control Of Property

Providing the Lessee shall comply with all of its obligations herein, the Lessor covenants that Lessee shall freely, peaceably and quietly enjoy and have full possession and control of the property without molestation, hindrance, eviction or disturbance by Lessor or by any other person or persons acting under or through Lessor whomsoever, for the full term or any extension hereof. The Lessor will, upon the request of Lessee, but at the expense of Lessee, enforce any rights, claims or privileges against any third party accruing to Lessor as owner of the property and, in Lessee's discretion, necessary or desirable for the benefit of Lessee or the property.

24. Net Worth & Financial Statements

The Lessee agrees to require each sub-lessee a minimum tangible net worth the amount of which will be mutually agreed upon at the time the sublease is made. Fixed assets will be valued at cost and an inventory based on cost or market, whichever is lower. An annual audited financial statement will be furnished within ninety (90) days after the close of each fiscal year to the Lessor and to the Secretary of the Interior.

25. Must Be Approved

It is further understood and agreed between the parties hereto that this lease shall be valid and binding only after approval of the Secretary, or his authorized representative.

In Witness Whereof, This contract is executed by and on behalf of the Lessor by the signature of its Tribal Council Chairman and Secretary and by Lessee as of the day and year first above written.

Mississippi Band Of Choctaw Indians

By /s/ Emmett T. York (1)
Chairman

Attest:

By: /s/ Prentice Morris
Secretary

Chata Development Company

By: (Signed) Phillip Martin
Chairman

Attest:

By: (Signed) Robert C. Benn
Secretary.

Approved:

(Signed) John F. Gordon
Superintendent, Choctaw Agency